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No. 95-815

In the Supreme Court of the United States

OCTOBER TERM, 1995

GLOBE NEWSPAPER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly held that the public interest in rehabilitating three juveniles accused of delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. 5031-5042, justified closure of the juvenile proceeding below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 61 F.3d 86. The opinion of the district court from which petitioner appealed (Pet. App. A20-A34) is reported at 862 F. Supp. 651. The district court's order entering judgment (Pet. App. A35-A58) is reported at 886 F. Supp. 934.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1995. A petition for rehearing was denied on August 25, 1995. Pet. App. A18. The petition for a writ of certiorari was filed on November 24, 1995 (a Monday). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. On July 19, 1994, the United States filed an information charging three juveniles under the Federal Juvenile Delinquency Act (FJDA or Act), 18 U.S.C. 5031 *et seq.* The information alleged that the juveniles conspired to interfere with the rights of others to enjoy the use of public areas, public accommodations and property, on account of their race and religion, in violation of 18 U.S.C. 241, 245, and 371. A grand jury indicted an adult for related violations of 18 U.S.C. 241 and 371 on the same date. Pet. App. A2, A20, A35.

On July 20, 1994, the district court ordered that, pursuant to the FJDA, 18 U.S.C. 5038, the public would not have access to the juveniles' arraignments or to any documents filed in connection with those arraignments. Pet. App. A21. On July 25, 1994, petitioner, a newspaper company, moved to intervene, seeking access to all proceedings and records concerning the juveniles. The juveniles and the government opposed petitioner's motions. *Ibid.*

After a hearing, the district court granted petitioner's motion to intervene for the purpose of seeking access but, pursuant to 18 U.S.C. 5032 and 18 U.S.C. 5038, it denied petitioner's request to attend the juvenile arraignments. Pet. App. A31, A33. The court first held that the FJDA mandates confidentiality in juvenile proceedings. *Id.* at A27. That result comports with the First Amendment, the court stated, because the First Amendment does not grant the public a right of access to such proceedings, which traditionally have not been open to the public. Pet. App. A23-A28. Alternatively, the court held, even if the Act gives district courts discretion to open

juvenile proceedings to the public or if there is a qualified First Amendment right of access to those proceedings, Pet. App. A25-A26, compelling governmental interests justified closure in this case. *Id.* at A30-A31. The court noted first that Congress's "strongly stated" purpose in enacting the FJDA was "to facilitate rehabilitation by protecting [juveniles] from the stigma of a criminal conviction." *Id.* at A30. The three juveniles in this case appeared particularly amenable to rehabilitation, the court noted, based on the facts that two of them had no criminal records and that the government, having considered the pertinent factors, had declined to seek the transfer of the three juveniles for prosecutions as adults. *Ibid.* The court also noted that there was no less restrictive alternative to closing the proceedings, since the juveniles' names had already been disclosed in several newspapers. *Id.* at A27, A31. The court did, however, order the release of selected redacted documents concerning the case, including the court docket and the court's final decision, finding that the public's interest in access to those documents outweighed the harm to the juveniles from their publication. *Id.* at A33.

2. The court of appeals affirmed. Pet. App. A1-A17. The court held, first, that, although the FJDA authorizes district courts to close juvenile proceedings to the public or to take lesser steps to insure confidentiality in a particular case, it does not mandate the closure of juvenile proceedings. *Id.* at A12. The court stated that its construction of the Act so as not to mandate closure avoided the need to address the issue of whether the public has a qualified First Amendment right of access to juvenile proceedings. See Pet. App. A8 (citing *DeBartolo Corp.* v. *Florida Gulf*

Coast Trades Council, 485 U.S. 568, 575 (1988)). Even in criminal proceedings involving adults, the court noted, the public's right of access is not absolute. Pet. App. A8. Rather, the Supreme Court has held that the press and public may be excluded from courtrooms "during the testimony of minor sex-offense victims," provided that a particularized determination of the need for such exclusions has been made. *Ibid.* (quoting *Globe Newspaper Co.* v. *Superior Court for the County of Norfolk*, 457 U.S. 596, 611 n.27 (1982)).

The court of appeals next held that the district court's reasons for closing the juvenile proceedings in this case were "sufficiently compelling" to justify closure under the First Amendment, even assuming *arguendo* that the "extremely stringent" First Amendment standards governing closure in adult criminal proceedings were applicable. Pet. App. A15-A16. The court noted that the district court had made "meticulously specific" findings, including that the Act seeks to protect juveniles from stigma in order to facilitate rehabilitation, that the juveniles in this case were particularly amenable to rehabilitation, that the juveniles opposed open proceedings, and that, because the media had already subjected the juveniles to "overwhelming publicity" and published their names, "adequate protection of the juveniles from stigma and public scrutiny would be impossible unless the proceedings were closed." *Id.* at A13.

The court rejected petitioner's claims that the juveniles' opposition to open proceedings was irrelevant as a matter of law to the closure determination, Pet. App. A13-A14, and that the district court had given undue weight to the fact that the juveniles had not been transferred for adult prosecution. *Id.* at A14. The court also rejected petitioner's claim that clo-

sure was inappropriate in light of the publicity that the case had received, stating that "to allow the media to 'leverage' partial information into an unfettered right of access to otherwise nonpublic proceedings would grant the media a dangerous control over important state interests." *Id.* at A15. The court did state, however, that it was "dubious" that the closure of juvenile proceedings necessitated the same level of justification under the First Amendment as the closure of adult criminal trials, Pet. App. A15, and, that under its reading of the Act, the closure of juvenile proceedings "is not an exception to some general rule of openness, but the norm." *Id.* at A13.

ARGUMENT

1. Petitioner seeks review (Pet. 6-7) to resolve "whether the public has a First Amendment right to attend juvenile delinquency trials commensurate with its right to attend criminal trials." The court of appeals, however, did not decide that question. Although the court of appeals expressed doubt that the same showing is needed under the First Amendment to justify closure of juvenile proceedings as is required to justify closure of an adult criminal trial, it ultimately found that closure in this case would be warranted even under the "extremely stringent" First Amendment standards governing closure of adult criminal trials. Pet. App. A15-A16; cf. *id.* at A8, A12 (noting that holding that the FJDA permits but does not mandate closure of juvenile proceedings enabled the court to avoid reaching a serious constitutional issue).[1]

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[1] The court of appeals' holding that the FJDA does not mandate closure of juvenile proceedings, but instead permits such closure as is consistent with the First Amendment,

2. Petitioner next argues (Pet. 24-28) that the lower courts misapplied the First Amendment test for closing adult court proceedings to the facts of this case. The courts below correctly stated that test: "reviewing courts must determine whether the closure is 'essential to preserve higher values' and 'narrowly tailored to serve that interest.'" Pet. App. A6 (quoting *Press Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 510 (1984) (*Press Enterprise I*); Pet. App. A25-A26, A30-A31).

a. Petitioner argues (Pet. 25) that the court of appeals erred in giving weight in the First Amendment balance to the FJDA's "overarching objective of protecting juveniles from stigma" (Pet. App. A13), because consideration of that factor might result in closure in many cases. As the court of appeals noted (Pet. App. A4), however, in enacting the FJDA, Congress made a judgment that protecting minors accused of delinquency from public stigma serves the important public interest of furthering the juveniles' rehabilitation. See, *e.g.*, *In re Sealed Case (Juvenile Transfer)*, 893 F.2d 363, 367-368 (D.C. Cir. 1990) (citing S. Rep. No. 1011, 93d Cong., 2d Sess. 22 (1974)); *United States* v. *Welch*, 15 F.3d 1202, 1211 n.12 (1st Cir. 1993), cert. denied, 114 S. Ct. 1863 (1994); S. Rep. No. 1989, 75th Cong., 3d Sess. 1 (1938). That judgment has long been shared by many state legislatures.[2] As

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accords with the only other federal appellate decision to address that question. See *United States* v. *A.D.*, 28 F.3d 1353, 1361 (3d Cir. 1994) (*P.G. Publishing*).

[2] See *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring in the judgment) ("It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full

those States have recognized, publication of the names of accused juveniles and the details of their delinquent acts and personal histories, revealed at a public adjudication, may "seriously impair the rehabilitative goals of the juvenile justice system and handicap the youth's prospects for adjustment in society and acceptance by the public." *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 107-108 (1979) (Rehnquist, J., concurring in the judgment).

b. Petitioner also argues (Pet. 25) that the lower courts erred in considering the fact that the juveniles had requested that the proceedings be closed. Petitioner's analogy (*ibid.*) to the preference of an adult for closed proceedings in order to protect his interest in receiving a fair trial is imperfect. The preferences of a defendant are irrelevant to whether closure is necessary for a fair trial; in the case of a juvenile charged with delinquency, however, those preferences may be relevant to the rehabilitative goals of the juvenile justice system.

c. Petitioner asserts (Pet. 26) that the fact that the juveniles had not been transferred for adult prosecution was irrelevant to the issue of whether they

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gaze and the youths brought before our juvenile courts have been shielded from publicity."); *id.* at 105 (opinion of the Court) (noting that "all 50 states have statutes that provide in some way for confidentiality" of juvenile offenders); *Globe Newspaper*, 457 U.S. at 612 (Burger, C.J., dissenting) ("Historically our society has gone to great lengths to protect minors charged with crime, particularly by prohibiting the names of offenders, *barring the press and public from juvenile proceedings*, and sealing the records of those proceedings.") (emphasis added); *In re Oliver*, 333 U.S. 257, 266 n.12 (1948) ("[w]hatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public").

were amenable to rehabilitation. However, the prosecutorial decision not to seek adult prosecution is based on statutory criteria, 18 U.S.C. 5032, that are themselves relevant to the strength of the publics interest in protecting juveniles from stigma. These criteria include the age and social background of the juvenile, the nature of the alleged offense, the extent and nature of the juvenile's prior delinquency record, the juvenile's present intellectual development and psychological maturity, and the amenability of the juvenile to the rehabilitative benefits of juvenile treatment programs. 18 U.S.C. 5032; see Pet. App. A14. In deciding whether to close the juvenile proceeding, the district court was not prohibited from concluding that the government, in deeming these juveniles suitable for juvenile proceedings, determined that the juveniles were amenable to rehabilitation.

Petitioner argues that the severity of the delinquent acts of which these juveniles were accused warranted opening their adjudications. In several categories of cases, the FJDA recognizes that society's interest in punishment outweighs its interest in rehabilitating the accused juveniles, and the Act accordingly requires adult-court proceedings in those cases. Adult proceedings are required when a juvenile commits one of several specified serious crimes, is a repeat offender, and is above a certain age. 18 U.S.C. 5032. This case is not one in which adult treatment was required. The district court was therefore within its discretion to consider the merits of closure.

d. Petitioner faults the courts below for failing to consider whether the district court's findings demonstrated a "'substantial probability' that the juveniles would be harmed by publicity that closure

would prevent" (Pet. 24-25 (quoting *Press Enterprise Co.* v. *Superior Court* 478 U.S. 1, 14 (1986) *(Press Enterprise II)*). In previous courtroom-closure cases, this Court, like the courts below in this case (Pet. App. A6), has articulated the test as whether in the particular case "closure is essential to preserve higher values and is narrowly tailored to serve that interest," *Press Enterprise II*, 478 U.S. at 13-14; *Press Enterprise I*, 464 U.S. at 510, or, similarly, whether closure "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest," *Globe*, 457 U.S. at 607. When the interest asserted has been the right of a defendant to a fair trial, the Court has held there must be "a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent" and no "reasonable alternatives to closure" that could adequately protect the defendant's right to a fair trial. *Press Enterprise II*, 478 U.S. at 14.

The courts below made clear their view that that standard was met in this case. The courts noted that "the media had already subjected the youths to overwhelming publicity," including publication of their names and identifying information (Pet. App. A13; see also *id.* at A27), and that redaction of the juveniles' names from public proceedings would be ineffective in protecting their privacy, because, "[r]ealistically, the press would merely publish detailed accounts of the 'redacted' proceedings," including every detail of the juveniles' alleged delinquency and personal histories divulged at the proceedings, "substituting the identifying information previously obtained." *Id.* at A16. The courts below concluded that "adequate protection of the juveniles from stigma and public

scrutiny would be impossible unless the proceedings were closed." *Id.* at A18; *id.* at A15, A16, A27, A31. That finding satisfies the requirement that there be a "substantial probability" of harm. See *Press Enterprise II*, 478 U.S. at 14.

e. Petitioner also asserts (Pet. 27-28) that the closure order in this case was unjustified because it "restrict[ed] access to judicial proceedings in order to protect the 'confidentiality' of information already lawfully" in the public domain. As the courts below found, however, closure of the proceedings in this case prevented the media from learning of and publicizing previously-unknown and potentially stigmatizing information about the juveniles' alleged acts and backgrounds. Pet. App. A15, A16, A27, A30-A31.[3] Furthermore, as the court of appeals observed, the media's publication of "*some* information" obtained from witness interviews and other sources does not render "any further attempts * * * to preserve confidentiality * * * futile or irrelevant" (Pet. App. A15) (emphasis added). See *In re J.D.C.*, 594 A.2d 70, 79 (D.C. Ct. App. 1991); *In re D.B.*, 439 A.2d 94, 98 (N.J. Juv. & Dom. Rel. 1981); *In re J.S.*, 438 A.2d 1125, 1130 (Vt. 1981). As the court of appeals noted (Pet. App.

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[3] It is likely that otherwise nonpublic information about a juvenile found delinquent under the FJDA will be adduced and discussed at the dispositional hearing of that juvenile. 18 U.S.C. 5037. The court may consider, for example, a juvenile's "personal traits, his capabilities, his background, any previous delinquency or criminal experience, any mental or physical defect, and any other [] factors" that may be relevant to the court's selection of a rehabilitative plan for the juvenile. 18 U.S.C. 5037. Such information will often not have been in the public domain, even when media reports have contained witness accounts of the alleged acts of delinquency.

A15), petitioner's claim is that, whenever the media have obtained (through witness interviews or other sources) and published "*some* information" about an incident, a media entity is thereafter entitled to *all* other information about the juvenile, no matter how damaging the publication of the new information might be to the juvenile's prospects for rehabilitation. The court of appeals was correct to reject that contention. Pet. App. A15; see *In re J.D.C.*, 594 A.2d at 79.

3. Petitioner finally asserts (Pet. 28) that review is warranted because the decision below conflicts with the Third Circuit's decision in *United States* v. *A.D.*, 28 F.3d 1353, 1361 (1994) *(P.G. Publishing)*, on the issue of whether there is a common law right of access to records of juvenile proceedings. The analysis of the court below (Pet. App. A16-A17), however, was consistent with that of the Third Circuit, both in recognizing "'a general right to inspect * * * judicial records and documents,'" *id.* at A16 (quoting *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)); *P.G. Publishing*, 28 F.3d at 1361 n.7, and in holding that that right is not absolute but is instead subject "to the sound discretion of the trial court" upon a proper showing. Pet. App. A16; *P.G. Publishing*, 28 F.3d at 1361 & n.7. Resolution of the scope of the public's right at common law to access to records of juvenile proceedings would, moreover, serve little purpose, because the issue of such access is now governed by the FJDA. There is no conflict between the decision below and the decision in *P.G. Publishing* with regard to the construction of that statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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